SUPREME COURT, U. S.
No. 71-39
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In the Supreme Court of the United States

OCTOBER TERM, 1971

MYRON LYZUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of knowingly failing to report for civilian work in lieu of induction, in violation of 50 U.S.C. App. 462(a). He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A), and, on August 3, 1971, denied a petition for rehearing (Pet. App. B).

The essential facts are not in dispute. Petitioner registered with the local board at the age of eight-

een. In his Classification Questionnaire (SSS Form 100), he indicated that he was a duly ordained minister of the Jehovah's Witnesses and conscientiously opposed to participation in war in any form. The Special Form for Conscientious Objectors (SSS Form 150) was not mailed to petitioner, however; rather, on March 18, 1964, his local board classified him I-A. After being found physically acceptable for military service, petitioner was ordered to report for induction on October 18, 1965; he reported but refused induction.

Thereafter, the State Director notified petitioner's local board that it had erred in failing to furnish petitioner with a conscientious objector form; he ordered the board to mail the form to petitioner and afford petitioner the opportunity to establish his conscientious objector claim. This was done; petitioner completed the form and returned it to the local board on March 4, 1966. On April 6, 1966, he wrote a letter requesting a personal appearance to show proof that he should be classified as "a conscientious objector and/or minister." The board then reopened petitioner's classification and granted him a personal appearance; it also provided him with a special form "for Illinois registrants claiming ministerial status," which petitioner completed and returned.

In the special form, a copy of which is annexed hereto as Appendix A, *infra*, pp. 9-11, petitioner stated that he was a Jehovah's Witness minister, associated with the Watchtower Bible & Tract Society of Pennsylvania; that his church had 174 members, all of whom were ministers; that he had been ordained in

1957 at the age of 12; that he was an "Assistant Bible Study Conductor" and an "Asst.-Literature Servant," and spent "3½ hours" each week "preach[ing] and teach[ing] the principles of religion." Petitioner also indicated in the special form that he worked "60 hrs. weekly" as an "operating engineer" for a construction company.

On April 27, 1967, following petitioner's personal appearance, the board voted unanimously to retain petitioner in Class I-A. He was notified of his appeal rights and, on May 9, 1967, the board received a request for appeal. Instead of forwarding petitioner's file to the State Appeal Board, however, the local board *sua sponte* reopened petitioner's classification and reconsidered his conscientious objector and ministerial claims. On May 18, 1967, it reclassified him I-O; a new notice of classification was mailed to petitioner, together with a letter apprising him of his right to request a personal appearance or to take an appeal from the I-O classification.

Petitioner made no such request, and he was thereafter processed by the local board for a civilian work assignment. On May 22, 1968, he was ordered to report to the board on June 5, 1968, for instructions to proceed to Elgin State Hospital, Elgin, Illinois. Petitioner failed to comply with this order, and the present indictment and conviction followed. The court of appeals affirmed (Pet. App. 1-6).

1. Petitioner objects here, as he did below, to the fact that the local board, on receipt of his appeal request, reopened his I-A classification *sua sponte* and reclassified him I-O, rather than immediately

forwarding his Selective Service file to the State Appeal Board as required by 32 C.F.R. 1626.14.[1] We do not disagree with petitioner that the procedure followed by the board in this case failed to adhere strictly to the regulatory requirements and should not be encouraged. Nevertheless, the court below properly affirmed petitioner's conviction in the peculiar circumstances of this case.

Petitioner had specifically sought exemption from military service as "a conscientious objector and/or minister." When he was denied both claims, he requested an appeal; the local board then undertook on its own initiative to review petitioner's file and proceeded to grant him exemption as a conscientious objector. On being notified of this change in status, and told of his right to appeal the I-O classification, petitioner raised no objection with the board. Consequently, his file was not forwarded to the State Appeal Board.

It is now argued that these procedures deprived the State Appeal Board from making a *de novo* review of petitioner's file and possibly reclassifying him IV-D as a minister. But, the action of the local board did not itself cut off administrative appellate review, as would have been the case had the board refused to reopen. Rather, the decision here to reclassify petitioner I-O specifically afforded him the opportunity to take an administrative appeal, and

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[1] The regulation provides in pertinent part that "[t]he registrant's file shall be forwarded to the appeal board * * * in no event * * * later than five days after the period for taking an appeal has elapsed."

he was so notified. Having declined to do so, petitioner is now in no position to complain of the failure of the State Appeal Board to consider his ministerial claim. Whatever procedural irregularity might be found in the local board's grant of conscientious objector status, it is clear that petitioner's position thereafter with respect to his administrative appeal rights was no different than it would have been if the board had taken such action originally.

2. Moreover, even if, as petitioner seems to contend (Pet. 12), his failure to request an appeal following the I-O classification can somehow be excused on the ground that he could reasonably assume his earlier appeal from the I-A classification was still pending, petitioner has not suffered any material prejudice resulting from the fact that his ministerial claim was never presented to the State Appeal Board. As pointed out by the court of appeals (Pet. App. 3):

> * * * [petitioner's] file is unusual in that the information furnished by him makes it clear that he did not meet the statutory requirements as a minister. It appears that he had been a "minister" according to his own lights since his baptism and ordination as a Jehovah's Witness at the age of 12, but the information he supplied thoroughly established that he did not preach and teach the principles of religion as his regular and customary vocation. [Footnote omitted.]

In short, it is apparent on this record that petitioner failed to make out a *prima facie* case for a ministerial exemption (see Appendix A, *infra*, pp.

9-11). Plainly, if he had not coupled his request for a IV-D classification with his conscientious objector claim, the local board could have properly refused to reopen under *Mulloy* v. *United States*, 398 U.S. 410. As the *Mulloy* opinion indicates, based on the information petitioner submitted here in his ministerial claim, he was not entitled to *de novo* review by the State Appeal Board. Accordingly, the fact that under the unusual circumstances of this case he never obtained such review is no basis for a claim of prejudice.

3. The instant case is thus significantly different from *United States* v. *Olvera*, 223 F. 2d 880 (C.A. 5), and *Chih Chung Tung* v. *United States*, 142 F. 2d 919 (C.A. 1), on which petitioner places some reliance. In those cases, it was clear on the record that the procedural irregularities were prejudicial to the registrant.[2] Here, the evidence is otherwise; the board's failure to forward petitioner's file promptly to the State Appeal Board, although technically contrary to 32 C.F.R. 1626.14, was of no practical consequence. Petitioner's ministerial claim did not even meet the minimum reopening standard enunciated by this Court in *Mulloy*. In these unique circumstances, there is no reason for further review by this Court. See, *e.g.*, *Knox* v. *United States*, 200 F. 2d 398 (C.A. 9); *Edwards* v. *United States*, 395

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[2] In *Olvera*, the local board's refusal to reopen was found to be arbitrary and unreasonable since it was made without regard to whether a *prima facie* claim had been submitted. In *Tung*, the error was in ordering the registrant to induction while his administrative appeal was pending.

F. 2d 453 (C.A. 9); *United States* v. *Chaudron*, 425 F. 2d 605 (C.A. 8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

APPENDIX A

SPECIAL INSTRUCTIONS FOR ILLINOIS REGISTRANTS CLAIMING MINISTERIAL CLASSIFICATION OF IV-D

1. Name of Registrant Myron Alex Lyzun
   SSS No. ----------
2. What is the name of the religious organization in which you claim to be a minister? Watchtower Bible & Tract Society of Pennsylvania.
3. What was the date of your affiliation with this religious Organization? 1952.
4. How long of a period of study and preparation did you engage in before you began your ministerial duties? Since 1952.
5. Where did you undertake such training, if any? East Unit, Chicago, Central Unit, Chicago—Maywood.
6. What were the major subjects of study during such training period, if any? The Holy Bible.
7. Did you receive a degree as a result of such training? (a) In liberal Arts? No. (b) In Theology? No. (c) ----------
8. By what ceremony were you ordained, by your church organization to preach and to teach the principles of religion? By Baptism and upon entry into organization. Baptized 11-7-57.
9. Date of ordination 11-7-57.
   (a) Place of ordination Y.M.C.A. Chicago, Ill.
10. What was your age at the time of ordination? 12.

11. What is the location and street address of the church where you preach and teach? 1042 S. 14th Ave., Maywood, Ill.

12. Do you have authority to perform religious ceremonies such as marriages, funerals etc.? Yes.

13. Have you performed such duties? No.

14. What is the number of members of the church unit or congregation in which you preach and teach the principles of religion? 67 & 107.

15. How many of the church members are ministers? 174.

16. How many hours each week do you spend in preaching and teaching the principles of religion? 3½ hours.

17. Does any of this time include time spent in the sale or distribution of religious literature? No.

18. Who is the person in the church to whom you are responsible for the conduct of your church duties and what is this person's official church title? Mat Stich, Congregation Servant.

19. Who is the person in the church to whom your immediate superior is responsible and what is his official church title? Howard Sawalich, Circuit Servant.

20. What, if any, are the unusual or special responsibilities of you in the church, which are in addition to those generally engaged in by all members of your church generally? Assistant Bible Study Conductor, Asst. Literature Servant.

21. How many hours each week do you spend in activities other than in ministerial duties of preaching and teaching the principles of religion? 60 hrs. weekly.

22. What is the nature of such other secular work? Operating Engineer.

23. Who is your secular employer? Sivestri Paving Contractors.

24. Address of employer? Alsip, Ill.

25. What is the total average monthly renumeration (before tax deduction) received by you from such other secular activities? $700.00 to $800.00.

26. What is the total average remuneration (before tax deduction) received by you directly from the ministerial work of preaching and teaching: Nothing.

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